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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/801,021	03/15/2004	Nicholas P. Van Brunt	7175-74297	1018
23643	7590	03/08/2006		
BARNES & THORNBURG 11 SOUTH MERIDIAN INDIANAPOLIS, IN 46204			EXAMINER DEMILLE, DANTON D	
			ART UNIT	PAPER NUMBER
			3764	
DATE MAILED: 03/08/2006				

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

10/801,021

Applicant(s)

VAN BRUNT, NICHOLAS P.

Examiner

Danton DeMille

Art Unit

3764

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-20 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-5 and 12-20 is/are rejected.
- 7) ☒ Claim(s) 6-11 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)                        | 4) <input type="checkbox"/> Interview Summary (PTO-413)                     |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)               | Paper No(s)/Mail Date. ____.  |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date <u>6/29/4</u> .  | 6) <input type="checkbox"/> Other: ____.                                    |

***Double Patenting***

1. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the “right to exclude” granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

2. Claims 1-20 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-53 of U.S. Patent No. 6,736,785. Although the conflicting claims are not identical, they are not patentably distinct from each other because it would have been obvious to leave out details of the means for maintaining pass through the oscillating compressive force to the chest and filter a breathing force.

***Claim Rejections - 35 USC § 102***

3. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

**4. Claims 1-3, 5, 15 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Meister.**

5. Meister teaches a chest band 1, a drive 7 and spring 30 provides a belt tightening movement to the slide 12 column 3, lines 12-22. The spring 30 not only assist or boosts the motor on the belt-tightening stroke of the slide 12, but also imparts what may be termed a spring action to the tightening of said belt. This tightening of the belt provides a belt tension on the chest of the patient. This would appear to comprehend the claimed compensation means.

6. Meister appears silent with regard to the exact number of cycles per second the device is operating however, the Meister device is capable of varying the speed and therefore is capable of promoting airway clearance of mucus. Some severe cases may not need a very high frequency and would appear to be comprehended by Meister since the claims do not specify exactly what would comprehend such a claim.

**7. Claims 1-5, 15-20 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Petersen.**

8. Petersen teaches a chest band 1 and a drive 4-9 to vary the circumference. The compensation means can be either the springs 9 or the piston and cylinder 6-8. The piston and cylinder would allow a certain degree of permission of the chest band circumference to expand and contract as the person breathes because air is a compressible fluid.

9. Regarding claims 15-20, the oscillating valve 12 allows the person to select the oscillation frequency if they so desire. The Petersen device is capable of being adjusted to any desired frequency including those claimed.

***Claim Rejections - 35 USC § 103***

10. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

**11. Claim 12 is rejected under 35 U.S.C. 103(a) as being unpatentable over Meister.**

12. Meister appears silent with regard to exactly what material is used for the pads however; using foam material is a conventional expedient and is well within the realm of the artisan of ordinary skill. It would have been obvious to one of ordinary skill in the art to modify Meister and complete the structure of Meister by using foam for the pad 3 as an obvious expedient.

**13. Claims 13 and 14 are rejected under 35 U.S.C. 103(a) as being unpatentable over Meister in view of Warwick et al. '571.**

14. Warwick teaches in paragraph 40, lines 12-15, "a breath sensing device can be used to signal the pressure control unit to shift to a lower pulse pressure amplitude on inspiration and return to a higher amplitude during expiration." It would have been obvious to one of ordinary skill in the art to modify Meister to include a breath sensing device as taught by Warwick to lower the pressure amplitude on inspiration so that the patient isn't hampered during inhalation.

**15. Claims 6-11 are allowable over prior art to which the examiner is aware.**


16. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Danton DeMille whose telephone number is (571) 272-4974.

The examiner can normally be reached on M-F from 8:30 to 6:00 EST.

17. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Greg Huson, can be reached on (571) 272-4887. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

18. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

3 March 2006

  
Danton DeMille  
Primary Examiner  
Art Unit 3764